IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 366 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AIYAKHAN @ ILYASKHAN BASIRKHANPATHAN

Versus

STATE OF GUJARAT

Appearance:

MR MM TIRMIZI for Petitioner No. 1

RULE SERVED for Respondent No. 1-2

Ms.Archana Raval, Assistant GOVERNMENT PLEADER, for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 06/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner has challenged the detention order passed against him by the detaining authority, by its order dated 25.12.2003 under

the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a 'bootlegger' under PASA. Along with the order of detention, the petitioner was also served with the grounds of detention.

In the grounds of detention, there is a reference about two registered cases against the petitioner. Both these cases are under the Bombay Prohibition Act. After consdiering those cases and after considering the statements of two witnesses, whose names have not been disclosed to the petitioner, the detention order is passed.

The learned Advocate appearing for the petitioner vehemently submitted that the last case was registered against the petitioner on 23.11.2003; yet, the detention orer is passed after a period of more than one month, as it was passed on 25.12.2003. It is submitted that in order to cover up the delay, statements of so-called secret witnesses are recorded by the authority. In order to substantiate this point, the learned Advocate for the petitioner relied on the judgment of this Court in Elesh Nandubhai Patel v. Commissioner of Police, 1997(1) GLH 381, wherein this Court has observed as under in paragraph 21 :-

> " ... ...
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> 21. In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent Court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 05, 1996, i.e. after a delay of 5 months and 15 days. It is of course true that the detaining authority relied on two incidents of 2nd October and 10th October, 1996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate,

> vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U.P. reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S. Ramamurthy reported in 1993(2) Suppli SCC 61.
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> ... ..."

It is also submitted that on the ground of delay in passing the detention order after the last incident, it can be presumed that the subjective satisfaction of the detaining authority is vitiated and on this ground, the petitioner is required to be released.

It is further submitted that as per the registered complaint, the petitioner was found dealing in Indian Made Foreign Liquor. According to the learned Advocate for the petitioner, no breach of public order is committed, as it can be stated that the petitioner's alleged activities are against law and order.

As regards the first point, no affidavit-in-reply is filed by the authority at all nor is any file produced before the Court. In such type of cases, normally, reply is required to be filed, controverting the averments made in the petition; otherwise, it can be presumed that the averments in the petition are correct. The writ sought for in the petition is in the anture of writ of habeas corpus and the authority is required to file affidavit-in-reply, pointing out that all constitutional safeguards are complied with. Since no affidavit-in-reply is filed by the respondents, the averments of the petitioner about delay in passing the detention order, have gone uncontroverted. In paragraph 4(l) of the petition, the said averments are made. Since the averments are not controverted, on the ground of delay in passing the detention order, this petition is required to be allowed.

The petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless he is required in connection with any other case. The Rule is made absolute accordingly.

July 6, 2004 (P.B. Majmudar, J.)

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(apj)